No. 84-363 (10)

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IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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23pp

TABLE OF CONTENTS

PAGE

1. The Douglas Amendment Has Not Unmistakably Authorized States To Adopt Regionally Discriminatory Legislation 2

2. The Reciprocal, Regionally Discriminatory State Statutes At Issue Infringe The Compact Clause 7

3. The Great Public Importance Of The Issues Raised By The Petition Underscores The Imperative Need For Immediate Review 9

APPENDICES:

A—Letter from Peter W. Rodino, Jr., Chairman of the U.S. House of Representatives Committee on the Judiciary, to Thomas P. O'Neill, Jr., Speaker of the U.S. House of Representatives (September 14, 1984) A1

B—Statutory Provisions A4

TABLE OF AUTHORITIES

Cases:	PAGE
Coyle v. Oklahoma, 221 U.S. 559 (1911)	9
First National Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966)	5
Florida v. Georgia, 58 U.S. (17 How.) 478 (1855)	8
Ford v. Surget, 97 U.S. 594 (1878)	8
Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840)	8
Iowa Independent Bankers v. Board of Governors, 511 F.2d 1288 (D.C. Cir.), *cert. denied*, 423 U.S. 875 (1975)	7
Lewis v. BT Investment Managers, Inc., 447 U.S. 27 (1980)	4
Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946)	4
Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838)	8
Securities Industry Association v. Board of Governors, —— U.S. ——, 52 U.S.L.W. 4943 (June 28, 1984)	5
South-Central Timber Development, Inc. v. Wunnicke, —— U.S. ——, 104 S. Ct. 2237 (1984)	1, 3, 6
Sporhase v. Nebraska, 458 U.S. 941 (1982)	3
United States Steel Corp. v. Multistate Tax Commission, 434 U.S. 452 (1978)	8

PAGE

Constitutional and Statutory Provisions:

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause) ..... *passim*

U.S. Const. art. I, § 10, cl. 3 (Compact Clause) ..... *passim*

12 U.S.C. § 1842(d) (Douglas Amendment) ..... *passim*

15 U.S.C. § 1011 (McCarran-Ferguson Act) 4

Conn. Act. 83-411 (Reg. Sess.) (1983) ..... *passim*

Mass. Gen. Laws Ann. Ch. 167A § 2 ..... *passim*

Other:

G. Bancroft, *History of the Formation of the Constitution* (1882) 9

Brief for United States as Amicus Curiae Supporting Petitioner, *South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S. Ct. 2237 (1984) 1–2

Debates in the Federal Convention of 1787, reprinted in *Documents Illustrative of the Formation of the Union of American States*, H. Doc. No. 398, 69th Cong., 1st Sess. (1927) 9

Federalist Paper No. 7 (Rossiter ed. 1961) 9

Letter of Congressman Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, to Congressman Thomas P. O'Neill, Jr., Speaker of the House (September 14, 1984) 6

REPLY BRIEF FOR PETITIONERS

The Solicitor General's brief demonstrates compellingly the need for review by this Court at this time. He acknowledges that "an authoritative decision by the Court . . . would be of substantial public benefit," and states that "if the Court believes that it eventually will become necessary to address the issues presented here—either because of their importance, or because of the possibility that a conflict among the circuits will develop—doing so in this case would be wise." Board Opp. 11.

The Solicitor General's ground for hesitation in urging further review is that the decision below, although not "free from doubt," is "correct." *Id.* at 4, 13. Nevertheless, he acknowledges the force of petitioners' assertion that the Douglas Amendment does not explicitly permit states "to discriminate among their sister states." *Id.* at 7. He adds that, in view of the "unusual nature of the challenged arrangements in this case—which explicitly create combinations of states that seemingly were designed for the purpose of excluding other states—[petitioners'] argument is entitled to serious consideration." *Id.* at 7.

In this brief, we address the Solicitor General's arguments and reply to the contentions of the other respondents, which largely mirror the views expressed by the Solicitor General. We sharply disagree with the Solicitor General's view that this case presents "only a relatively straightforward question of statutory interpretation." Board Opp. 12. The Solicitor General acknowledges that "[i]n the absence of congressional authorization, there is little doubt that state restrictions on interstate banking such as the ones in this case would run afoul of the Commerce Clause." *Id.* at 4. And, as the Solicitor General himself stated last Term in his brief (p. 9) in *South-Central Timber Development, Inc.* v. *Wunnicke*, —— U.S. ——, 104 S. Ct. 2237 (1984): "The requirement of explicit congressional approval for discriminating state statutes is a necessary corollary to the proposition that the Commerce Clause is designed to protect unrepresented interests from parochial discrimination. . . . It assures that the national legislative process will afford the representatives of the

burdened interests a clear opportunity to voice their views."

Under the court of appeals decision, the door is open to discriminatory multi-state arrangements that conflict with the national interests embodied in the Commerce Clause, as well as the Compact Clause, with the clear and present danger of interstate divisiveness and economic retaliation by boycotted states. The *amicus curiae* brief filed by the State of New York provides eloquent testimony that allowing one group of states to boycott another will have far-reaching consequences for the economic welfare of the Nation.

1. The Douglas Amendment Has Not Unmistakably Authorized States To Adopt Regionally Discriminatory Legislation

a. Although the Solicitor General and the other respondents contend that the Douglas Amendment authorizes states to form regionally discriminatory combinations, they cannot agree on where such authorization is to be found. The intervenor-respondents, on the one hand, argue that the "legislative history" supplies such evidence. CBT Opp. 11-14. The Solicitor General, on the other hand, properly refutes that contention, observing that the "sparse legislative history" does not "address the question whether Congress intended to authorize the creation of regional banking arrangements." And, like the Board, he rejects the relevance of "conclusory statements" in the legislative history. Board Opp. 5; Pet. App. A66.

The Solicitor General nonetheless asserts that the "literal terms of the Douglas Amendment" authorize such discrimination, reasoning that "the State Acts at issue here plainly are 'statute laws' that 'specifically authorize' the acquisition." Board Opp. 5. In so arguing, the Solicitor General contradicts the Board. The Board conceded that "the Douglas Amendment does not appear *on its face* to authorize discrimination by Connecticut in favor of its own residents and those of Massachusetts and other New England states . . ., but against all other states." The Board also admitted that the "general" language of

the Douglas Amendment "does not appear to meet the stringent test of explicitness laid down by the Supreme Court." Pet. App. A65 (emphasis in original).

The language of the Douglas Amendment discloses nothing that suggests that Congress unmistakably intended to give the states power to form discriminatory regional boycotts, or that Congress meant to waive the protections of the Commerce Clause. The Douglas Amendment empowers the Board to approve interstate bank acquisitions if "the acquisition of . . . a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d). The language of the statute contains not one word about the form such state statutes might take and, more important, the validity of the many possible permutations. While Congress obviously contemplated that some states might enact laws permitting interstate banking in the future, it nowhere stated or implied that such statutes would not be subject to scrutiny under the Commerce and Compact Clauses, or any other provisions of the Constitution.

b. Under this Court's Commerce Clause decisions, the proponents of discriminatory laws must show that Congress intended to authorize discrimination that would otherwise violate the Commerce Clause. It is not sufficient that Congress contemplated the enactment of state laws in the field, or even that Congress deferred to such laws because such deference does "not indicate that Congress wished to remove federal constitutional constraints on such state laws. The negative implications of the Commerce Clause . . . are ingredients of the *valid* state law to which Congress deferred." *Sporhase* v. *Nebraska*, 458 U.S. 941, 960 (1982) (emphasis in original). Rather, the statutory language must unmistakably show "congressional authorization of otherwise impermissible state interference with interstate commerce," thereby establishing that "Congress affirmatively contemplated otherwise invalid state legislation." *Wunnicke*, —— U.S. at ——, 104 S. Ct. at 2242 (1984).

There is no support for the Solicitor General's suggestion that "the decisions in which the Court has applied this doctrine have little bearing here." Board Opp. 7. Banking and related financial activities, while of substantial local concern, are not exempt from the traditional strictures of the Commerce Clause. *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 38 (1980). And the suggestion that this fundamental doctrine of Commerce Clause jurisprudence is limited to standard non-preemption clauses or controversies where analogous federal policy is relied upon (Board Opp. 8 n.14; CBT Opp. 21-23) has no support in the case law, as *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408, 427-31 (1946)—the principal case cited by respondents—makes clear. Indeed, the *Benjamin* Court found the requisite "unmistakable intent" in various substantive provisions of the McCarran-Ferguson Act, which authorizes taxation by states of insurance companies free from the constraints of the dormant Commerce Clause by the following *express* language: "The Congress hereby declares . . . that silence on the part of Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several states." 15 U.S.C. § 1011. This and other unambiguous language (*see* App., *infra*, A4-A5), coupled with equally unambiguous legislative history, established that Congress, acting with "full knowledge" (328 U.S. at 430), had waived the protections of the Commerce Clause.

The explicit language employed by Congress in the statute reviewed in *Benjamin*, and this Court's reliance on that specificity, underscore the absence of any comparable language in the Douglas Amendment and the resulting constitutional infirmities of the statutes challenged here.

c. The language and history of the Douglas Amendment —which respondents concede was enacted in hasty fashion— contain no indication that Congress intended to tear down the traditional barriers to discriminatory state legislation and thereby empower groups of states to boycott sister states. There is no grant of authority to discriminate in a manner that would otherwise contravene the Commerce Clause. Therefore, it is wrong for respondents to argue (CBT Opp. 22, 27 n.66) that petitioners must cite "legis-

lative history indicating an intent to restrict the states' authority in this regard." The burden of persuasion cannot be shifted: it is *respondents' burden* to demonstrate by unmistakable evidence that discriminatory state legislation was so authorized. That is a burden they cannot sustain.

In view of these well-established principles, this is no occasion to "defer to the Board" on the issue of statutory construction raised in this case. Board Opp. 6. "A reviewing court 'must reject administrative constructions of a statute . . . that are inconsistent with the statutory mandate . . . .' " *Securities Industry Association* v. *Board of Governors*, —— U.S. ——, 52 U.S.L.W. 4943, 4945 (June 28, 1984). Moreover, the Board has expressed perplexity over the statutory issue (Pet. 7-8), and, in the court of appeals, declined to interpret the statute at all, reasoning that the "legal issue of the constitutionality of the Connecticut and Massachusetts regional interstate banking statutes remains for this Court to decide." App. Br. 19. It is manifestly inappropriate for the Solicitor General to recommend that this Court rely on the very "expertise" that the Board denies having exercised in this proceeding.

d. Certain respondents (but neither the Solicitor General nor the Board) also argue (CBT Opp. 10, 23-24) that "*Congress*—not the states—'balkanized' the nation for purposes of interstate banking," and that this purportedly justifies any discriminatory legislation which the states might enact. The federal statutory pattern offers not the slightest support for unbridled discriminatory state legislation. Under the federal banking statutes, Congress has permitted individual states to exercise sovereign authority over internal banking affairs. All states are treated in an identical fashion. Congress has never given preferred status to some states, while relegating other states to the status of boycott targets. Federal policy is one of "competitive equality." *First National Bank* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966).

Moreover even if state law paralleled federal law in this area, respondents' argument would be unavailing.

"The fact that the state policy in this case appears to be consistent with federal policy—or even that state policy furthers the goals we might believe that Congress had in mind—is an insufficient indicium of congressional intent." *Wunnicke,* —— U.S. at ——, 104 S. Ct. at 2243.

e. Respondents' assertion (CBT Opp. 10) that Congress authorized regionally discriminatory state laws "28 years ago when it enacted the Douglas Amendment" ignores the current legislative realities described in the Solicitor General's brief. Board Opp. 13. In this connection, we draw the Court's attention to the September 14, 1984 letter of Congressman Peter W. Rodino, Jr., Chairman of the House Judiciary Committee, to Congressman Thomas P. O'Neill, Jr., in which he emphasizes that regionally discriminatory banking legislation has serious Constitutional and economic implications, and could "significantly undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent states from aligning themselves into rival economic coalitions." App., *infra,* A3.

In view of these substantial unresolved questions of policy, it would be a gross disservice to Congress simply to impute to it an unexpressed intention to permit regionally discriminatory statutes based on the general language of the Douglas Amendment.

f. Respondents mistakenly argue (CBT Opp. 15-19) that the Connecticut and Massachusetts Acts are similar to interstate banking statutes enacted by certain other states which utilize geographically neutral criteria to regulate the expansion of out-of-state bank holding companies. They speculate that if the Conecticut and Massachusetts Acts are unconstitutional these other statutes may also be called into question. While these other statutes are not at issue here, the Board nonetheless answered respondents' contention: such statutes impose "substantially less of a burden on commerce in the furtherance of legitimate state objectives . . . ." Pet. App. A71. In contrast to the state statutes at issue in this case, the other states' laws do not rest on naked regional parochialism, do not have the purpose and effect of imposing a concerted multi-

state boycott against disfavored sister states, and are not a source of friction in the federal system.

For similar reasons, there is no merit to respondents' assertion that *Iowa Independent Bankers* v. *Board of Governors,* 511 F.2d 1288 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975), lends support to the decision below. The state statute at issue in that case was not part of a multi-state exclusionary arrangement, and was not intended to secure a competitive advantage for certain states at the expense of sister states. Accordingly, the Board correctly held that the *Iowa Independent Bankers* decision—which involved neither a Commerce Clause nor Compact Clause challenge—is irrelevant to the issues in the present litigation. Pet. App. A67-A69.

2. The Reciprocal, Regionally Discriminatory State Statutes At Issue Infringe The Compact Clause

The harmful impact of these discriminatory state laws is compounded radically by the fact that they are constituents of a multi-state boycott. As all parties agree, these regionally restrictive, reciprocal laws are rapidly spreading across the United States. The State of New York has pointed out in its brief *amicus curiae* in this Court that such attempts to boycott the interstate commerce emanating from disfavored states are a potent source of friction in the federal system. Such discriminatory compacts strengthen commerce within preferred geographical regions at the expense of commerce in excluded states with the inevitable threat of economic retaliation. *Compare* Connecticut Opp. at 17 (the compacting states "are justified in excluding New York" in order to pursue local economic advantages) *with* New York *amicus* brief at 2 ("[t]hese statutes are manifestly harmful to the interests of the State of New York"). This is exactly what the Compact Clause is designed to avert.

a. Respondents' confusion about the governing Constitutional standard requires a brief summary of the pertinent provisions. Agreements among states which invade the rights of their sister states are subject to flat prohibition

under the Treaty, Alliance or Confederation Clause of the Constitution. *Holmes* v. *Jennison,* 39 U.S. (14 Pet.) 540, 570 (1840); *Ford* v. *Surget,* 97 U.S. 594, 603 (1878); *United States Steel* v. *Multistate Tax Commission,* 434 U.S. 452, 460, 467 n.18 (1978). Agreements of lesser concern to sister states, but which will affect their sovereign interests, are subject to prior Congressional approval under the Compact Clause to preserve the harmony of the federal union. 434 U.S. at 467 n.18. Only those agreements which, unlike the New England Compact, have no potential to derange relations among the states may evade Congressional supervision. Such agreements may "neither project a new presence onto the federal system nor alter any state's basic sphere of authority." *Id.* at 469 n.21.

Respondents' insistence that in order for a compact to require Congressional approval it must encroach directly on federal supremacy (CBT Opp. 25 n.64) would render the Compact Clause a superfluous restatement of the Supremacy Clause. Rather, multi-state compacts require prior approval if they have the "potential" to undermine the welfare of the federal union (*Multistate Tax Commission,* 434 U.S. at 471-72), *or* threaten "the derangement of [a state's] federal relations with the other states of the Union." *Rhode Island* v. *Massachusetts,* 37 U.S. (12 Pet.) 657, 726 (1838). *See also Florida* v. *Georgia,* 58 U.S. (17 How.) 478, 494 (1855) (the Compact Clause "is obviously intended to guard the rights and interests of other States, and to prevent any compact or agreement between any two states, which might affect injuriously the interest of the others"). No congressional renunciation of this federal interest in a harmonious union of the states can be read into the Douglas Amendment.

The multi-state compact at issue in this case clearly expands the political stature of the compacting states by increasing their economic leverage at the direct expense of boycotted states, and thus falls within the category of compacts that require Congressional review and approval. Such a compact erodes the foundations of a harmonious union by sowing discord among the states in contravention of fundamental federal interests and may, as the Chairman of the House Judiciary Committee has noted,

provoke reprisals and "retaliation by States in excluded regions of the country." App., *infra*, A3. *See also Coyle* v. *Oklahoma*, 221 U.S. 559, 580 (1911) ("the constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized").

b. To allow such a combination to be undertaken by the states without Congressional approval is to ignore the history of the Constitution itself. The Founding Fathers repeatedly warned of the dangers of "partial confederacies" or "combinations" among the states. *See* excerpts from Madison, *Debates in the Federal Convention of 1787*, reprinted in *Documents Illustrative of the Formation of the Union of the American States*, H. Doc. No. 398, 69th Cong., 1st Sess. (1927), quoted at 10-11 of Chase Manhattan Bank's *amicus* brief. *Accord Federalist Paper* No. 7 at 62-63 (Rossiter ed. 1961). Because of this fear of "schemes for division" of the states "into two or more separate groups," the Founding Fathers strictly regulated "any agreement or compact with any other state." II G. Bancroft, *History of the Formation of the Constitution* 141 (1882). The Compact Clause was designed to protect the states against discord caused by self-aggrandizing combinations: "Each state was confined in its government strictly to its own duties within itself." *Id.*

These concerns of the Founding Fathers reinforce the dictates of common sense. States may not form regional combinations harmful to the welfare of sister states without the approval of the national legislature.

3. The Great Public Importance Of The Issues Raised By The Petition Underscores The Imperative Need For Immediate Review

a. The Solicitor General has agreed with petitioners that weighty public policy considerations militate in favor of immediate review in this case (Board Opp. 10-11): (1) the questions decided by the court of appeals are certain to spawn additional burdensome litigation across the country; (2) this case presents "issues concerning the basic relationship of the states to one another, of the sort this Court

frequently has addressed;" (3) if review is deferred, the structure of the entire banking industry will be fundamentally and perhaps irreversibly altered before Congress or this Court can review the situation; and (4) delay in securing review will lead banking institutions across the country to invest substantial resources in acquisitions that may later require divestiture. In view of these considerations, "an authoritative decision by the Court in advance of this widespread activity would be of substantial public benefit." *Id.* at 11.

b. The countervailing considerations cited by the Solicitor General do not justify a postponement of review. While Congress *might* someday enact legislation in this area that would resolve the issues, the Solicitor General is forced to concede that "congressional action is far from assured." Board Opp. 13. Indeed, in 1984, as in 1983, Congress has once again refused to authorize exclusionary banking confederations.

The absence (to date) of a conflict among the circuits is also not a reason for deferring review, since the decision below conflicts in principle with past decisions of this Court construing both the Commerce and Compact Clauses. Moreover, waiting for a conflict among the circuits will expose Congress, this Court, and the general public to serious hazards. The structure of the entire banking industry will be transformed through regionally discriminatory laws before either Congress or this Court can intercede. Congress and this Court will then be faced with a *fait accompli.* And if the Second Circuit's ruling ultimately proves to be erroneous, a painful choice would be thrust upon the Nation between widespread divestitures and allowing the economy to suffer the continuing effects of unconstitutional balkanization.

In these circumstances, review by this Court should not be postponed. Additional litigation in other circuits could not contribute to the elucidation of the issues, which already have been explored in comprehensive detail by the parties, the *amici,* and the tribunals below. They are well-focused questions amenable to ready resolution by this Court under familiar legal principles.

Respectfully submitted,

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APPENDICES

APPENDIX A

Letter from Peter W. Rodino, Jr., Chairman of the U.S. House of Representatives Committee on the Judiciary, to Thomas P. O'Neill, Jr., Speaker of the U.S. House of Representatives (September 14, 1984)

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
Washington, D.C. 20515
Telephone 202-225-3951

September 14, 1984

Honorable Thomas P. O'Neill, Jr.
The Speaker
House of Representatives
Washington, D.C. 20515

Dear Mr. Speaker:

The "Financial Services Competitive Equity Act" (S. 2851), which was debated on the Senate floor during the past week, will reach the House shortly. On behalf of the Committee on the Judiciary, I am writing to you to request that this bill be referred to this Committee for consideration and possible action as a result of certain provisions which substantially affect matters coming within Rule X jurisdiction of the Committee.

In particular, Title X of S. 2851 contains language that would grant prior Congressional consent to certain groupings of States to enter into interstate compacts involving regional banking activities. It is important that this Committee—which has jurisdiction over interstate compacts generally—be permitted to review the language and intent of this provision because Title X on its face appears to be

a major departure from past practice in the manner in which Congress approves an interstate compact consistent with the Compact Clause of the Constitution. In the past, Congress has consented to two types of compacts: the first being those which are designed to promote cooperation among States and which are open to all affected States seeking to join; and the second being those that do not interfere with the Federal regulation of matters of national concern. In contrast, Title X would appear to authorize a commercial compact open only to a "select" group of States in subject matter areas specifically regulated by the Federal Government.

In addition, Title X departs from past Congressional practice and procedure in that it would grant prior approval to such compacts rather than to require subsequent approval on a case-by-case basis. Typically, compacts are negotiated and agreed to by the States and then submitted to the Congress for careful review and approval. Title X would, in essence, preauthorize compacts without advanced review of the content or standards contained in those agreements. While the Congress has on rare occasions authorized certain compacts in advance, it has done so only after long and thoughtful deliberation of the potential consequences. The Judiciary Committee—the Committee of jurisdiction in this instance—has had no such opportunity to develop a record or engage in any deliberations on the potential Constitutional and economic implications of Title X.

By its very nature, an interstate compact of this type also raises other Constitutional questions requiring careful consideration. It is possible, even likely, that regional banking compacts designed to promote the interests of certain banks

within particular regions at the expense of other financial institutions in the rest of the country may significantly undermine the rationale of the Commerce Clause, which was designed to eradicate internal trade barriers and prevent States from aligning themselves into rival economic coalitions. If this were, in fact, the unfortunate outcome of Title X, such might invite retaliation by States in excluded regions of the country.

Title X also has important implications for the Federal antitrust laws, also a subject matter within the jurisdiction of the Judiciary Committee. The cornerstone of American antitrust law is the principle that unrestrained competition will yield the best allocation of our economic resources, thus benefitting the interest of consumers. Because such compacts as provided by Title X may work to restrict competition for deposits and loans, the price for that type of restriction might well be paid by consumers. The implications of this legislation for the national competition policy will therefore also need careful scrutiny by this Committee.

For the above reasons, I request that you refer S. 2851 to the Judiciary Committee for its review. Furthermore, it is requested that Members of this Committee be included in any conference on S. 2851.

With best wishes,

Sincerely,

/s/ Peter W. Rodino
Peter W. Rodino, Jr.
Chairman

PWR:jyl

APPENDIX B

Statutory Provisions

1. The McCarran-Ferguson Act, 15 U.S.C. §§ 1101-1105 (1946), provides in pertinent part:

> "[T]he Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.
>
> SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.
>
> (b) No Act of Congress shall be construed to invalidate, impair, or supercede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . . ."

2. The Douglas Amendment, 12 U.S.C. 1842(d), provides in pertinent part:

> "Notwithstanding any other provision of this section, no application . . . shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966 or the date on which such company became a bank holding com-

pany, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. . . ."